FILED
JUL 22 1988

No. 87-6405

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PHILLIP D. TOMPKINS,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Writ of Certiorari to the Court of Criminal Appeals of Texas

---

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS AMICUS CURIAE

CONRAD K. HARPER
STUART J. LAND
Co-Chairmen

NORMAN REDLICH
Trustee

WILLIAM L. ROBINSON
JUDITH A. WINSTON

LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
1400 Eye Street, N.W.
Suite 400
Washington, D.C. 20005
(202) 371-1212

ROBERT E. MONTGOMERY, JR.
Counsel of Record

ERIKA A. KELTON

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
1615 L Street, N.W.
Suite 1300
Washington, D.C. 20036
(202) 223-7300

Attorneys for Amicus Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATEMENT OF INTEREST OF AMICUS CURIAE	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. *BATSON v. KENTUCKY* REAFFIRMS LONG-ESTABLISHED PRECEDENT THAT JURY SELECTION MUST BE TOTALLY RACE NEUTRAL	5
II. THE TRIAL COURT ABDICATED ITS RESPONSIBILITY TO EVAULATE THE LEGITIMACY OF THE PROSECUTOR'S EXPLANATION OF PEREMPTORY CHALLENGES AGAINST WHICH A PRIMA FACIE CASE HAD BEEN MADE	9
A. The Trial Court Must Actively Scrutinize The Prosecutor's Explanation For Pretext And Mixed Motives	9
B. The Trial Court Utterly Failed To Fulfill Its Duty To Determine The Legitimacy Of The Prosecutor's Explanations	15
C. The Trial Court May Consider Only The Prosecutor's Actual Reasons For Challenge..	18
III. THE APPELLATE COURT APPLIED INCORRECT STANDARDS OF REVIEW	19
A. The Court Of Criminal Appeals Failed To Review The Legal Sufficiency Of The Trial Court's Findings	20
B. The Court Of Criminal Appeals Erred By Reviewing The Trial Court's Findings According To A "Rational Basis" Standard, Instead Of The "Clearly Erroneous" Standard Required By *Batson*	22

TABLE OF CONTENTS—Continued

	Page
1. The Court Of Criminal Appeals Failed To Review The Entire Record Before Upholding The Trial Court's Findings Regarding The Prosecutor's Intent	24
2. The Court Of Criminal Appeals Failed To Hold The Trial Court's Findings Clearly Erroneous, Despite Its Conviction That Those Findings Were Not Credible	25
CONCLUSION	28

TABLE OF AUTHORITIES

CASES	Page
Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)	12
Alexander v. Louisiana, 405 U.S. 625 (1972)	4, 5, 9, 11
Amadeo v. Zant, 108 S. Ct. 1771 (1988)	24
Anderson v. Bessemer City, 470 U.S. 564 (1985)	5, 23, 27
Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977)	4, 8, 9, 15
Batson v. Kentucky, 476 U.S. 79 (1986)	*passim*
Bose Corp., Inc. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984)	21, 24
Cassell v. Texas, 339 U.S. 282 (1950)	6
Commonwealth v. DiMatteo, 12 Mass. App. Ct. 547, 427 N.E.2d 754 (1988)	14
Commonwealth v. Soares, 377 Mass. 461, 387 N.E. 2d 499, *cert. denied*, 444 U.S. 881 (1979)	14
Ex parte Branch, No. 86-500, slip op. (Ala. Dec. 4, 1987)	10, 23
Ex parte Virginia, 100 U.S. 339 (1880)	5
Floyd v. State, 511 So. 2d 762 (Fla. 1987)	13
Gamble v. State, 257 Ga. 325, 357 S.E.2d 792 (1987)	10, 14
Garrett v. Morris, 815 F.2d 509 (8th Cir.), *cert. denied sub nom. Jones v. Garrett*, 108 S. Ct. 233 (1987)	10, 13
Gray v. Mississippi, 107 S. Ct. 2045 (1987)	21
Hopkins v. Price Waterhouse, 825 F.2d 458 (D.C. Cir. 1987), *cert. granted*, 108 S. Ct. 1106 (1988)	8
Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844 (1982)	23
Jackson v. Virginia, 443 U.S. 307 (1979)	20
Johnson v. State, No. 57,526, slip op. (Miss. May 18, 1988) (en banc)	23
McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976)	8, 12
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)	4, 11, 12
Norris v. Alabama, 294 U.S. 587 (1935)	4, 11, 20
People v. Hall, 35 Cal. 3d 161, 672 P.2d 854 (1983)	10, 13

TABLE OF AUTHORITIES—Continued

	Page
People v. Trevino, 39 Cal. 3d 667, 704 P.2d 719 (1985)	13, 14
People v. Turner, 42 Cal. 3d 711, 726 P.2d 102 (1986)	13
People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748 (1978)	13, 14
Peters v. Kiff, 407 U.S. 493 (1972)	11
Pullman-Standard v. Swint, 456 U.S. 273 (1982)	21
Rogers v. Richmond, 365 U.S. 534 (1961)	21
Roman v. Abrams, 822 F.2d 214 (2d Cir. 1987)	13, 14
Schneckloth v. Bustamonte, 412 U.S. 218 (1973)	20
Schuessler v. State, 719 S.W.2d 320 (Tex. Crim. App. 1986)	23
State v. Alvarado, 226 Neb. 195, 410 N.W.2d 118 (1987)	23
State v. Antwine, 743 S.W.2d 51 (Mo. 1987), *cert. denied*, 108 S. Ct. 1755 (1988)	10
State v. Gilmore, 103 N.J. 508, 511 A.2d 1150 (1986)	10, 14
State v. Gonzalez, 206 Conn. 391, 538 A.2d 210 (1988)	24
State v. Jackson, No. 477A87, slip op. (N.C. May 5, 1988)	23
State v. Slappy, 522 So. 2d 18 (Fla. 1988)	13, 14
Stone v. Powell, 428 U.S. 465 (1976)	24
Strauder v. West Virginia, 100 U.S. 303 (1880)	5
Swain v. Alabama, 380 U.S. 202 (1965)	3
Texas v. Mead, 465 U.S. 1041 (1983)	19
Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981)	11, 12, 18
Time, Inc. v. Firestone, 424 U.S. 448 (1976)	21
United States v. Chalan, 812 F.2d 1302 (10th Cir. 1987)	14
United States v. United States Gypsum Co., 333 U.S. 364 (1948)	5, 23, 27
Van Guilder v. State, 709 S.W.2d 178 (Tex. Crim. App. 1985), *cert. denied*, 106 S. Ct. 2891 (1986)	23
Wainwright v. Witt, 469 U.S. 412 (1985)	15
Washington v. Davis, 426 U.S. 229 (1976)	4, 8

TABLE OF AUTHORITIES—Continued

	Page
Whitus v. Georgia, 385 U.S. 545 (1967)	6, 11, 20
Younger v. Harris, 401 U.S. 37 (1971)	19
RULE AND STATUTES	
Supreme Court Rule 36.2	2
28 U.S.C. §§ 2254(b), (d)	20
ARTICLE	
Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229 (1985)	21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-6405

PHILLIP D. TOMPKINS,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Writ of Certiorari to
the Court of Criminal Appeals of Texas

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS AMICUS CURIAE

STATEMENT OF INTEREST OF AMICUS CURIAE

The Lawyers' Committee for Civil Rights Under Law was organized in 1963, at the request of the President of the United States, to involve private attorneys in the national effort to assure the civil rights of all Americans. During the last 25 years the Lawyers' Committee and its local affiliates have enlisted the services of thousands of members of the private bar in addressing the legal problems of minorities and the poor. The Committee's membership today includes former United States Attorneys General and Solicitors General, past presidents of the American Bar Association, a number of law school deans and many of the nation's leading lawyers. The widespread perception that prosecutors have exercised peremptory challenges in a discriminatory manner, and the

importance of the principle of equal justice under law, prompted the Lawyers' Committee to file a brief *amicus curiae* in *Batson v. Kentucky*, 476 U.S. 79 (1986). The same concerns, coupled with the fact that the *Batson* principles will remain extremely fragile until this Court provides more guidance concerning their implementation, prompt the Lawyers' Committee to file a brief *amicus curiae* in support of petitioner in this case. The parties have consented to the filing of this brief, which is therefore submitted pursuant to Supreme Court Rule 36.2.

STATEMENT OF THE CASE

Petitioner Phillip Daniel Tompkins, a black man, was convicted by a Texas jury of capital murder, based on his alleged intentional killing of a white woman while in the course of committing or attemptin, to commit robbery and kidnapping. (J.A. 56.) He was sentenced to death. (J.A. 56.)

The venire at petitioner's trial included thirteen blacks. Of these prospective black jurors, eight were challenged for cause. The remaining five black venirepersons were excluded by the prosecutor's peremptory challenge. Petitioner objected and moved to quash the jury on grounds that the prosecution had exercised its peremptory strikes to purposefully exclude venirepersons on the basis of race. The trial court overruled petitioner's motion, and did not inquire into the State's reasons for striking all the black venirepersons. (J.A. 57-58.)

While petitioner's appeal was pending review by the Court of Criminal Appeals of Texas, this Court decided *Batson v. Kentucky*, 476 U.S. 79 (1986). In April 1987, the reviewing court abated the appeal, and sent the case back to the trial court with instructions to conduct a *Batson* hearing. Following that hearing, the trial court ruled that although petitioner had made a *prima facie* showing of prosecutorial discrimination in the exercise of

peremptory challenges, that showing had been rebutted by the State's explanations for the suspect peremptory strikes. (J.A. 47-49.)

The Court of Criminal Appeals affirmed the trial court's *Batson* findings and petitioner's conviction, rejecting petitioner's constitutional claim under *Batson* on the ground that the trial court had not acted irrationally in finding that there was no discrimination. (J.A. 72-73.)

SUMMARY OF ARGUMENT

This case raises squarely the question of whether the increased protection for defendants' fourteenth amendment rights which the Court mandated in *Batson v. Kentucky*, 476 U.S. 79 (1986) will be vitiated by ineffective trial court procedures and overly deferential appellate review. In *Batson*, this Court once again acknowledged that "[d]iscrimination within the judicial system is [the] most pernicious," *id.* at 87-88, and that the potential for such discrimination is especially great in connection with prosecutors' exercise of peremptory challenges. *Id.* at 96.

In response to this continuing threat, *Batson* altered the twenty-year-old evidentiary ruling of *Swain v. Alabama*, 380 U.S. 202 (1965), to allow a defendant to rely on evidence from his own trial to establish a *prima facie* inference of discrimination in the prosecutor's use of peremptory challenges. Once established, the burden then shifts to the State to justify the suspect challenge by articulating "a [legitimate] neutral explanation related to the particular case to be tried." *Batson*, 476 U.S. at 98.

Having established the legal standards and the general framework within which they should be applied, however, the *Batson* court left important procedural questions unanswered. *Id.* at 99. Justice White's prediction —that "[m]uch litigation will be required to spell out the contours of the Court's equal protection holding today"

id. at 102 (White, J., concurring)—has proven correct. Now, two years later, the Court must return to the *Batson* problem and provide further guidance, without which clearly unconstitutional peremptory challenges such as those at issue here will be effectively immunized by inadequate judicial scrutiny.

Petitioner Tompkins' conviction should be held constitutionally defective under *Batson* on three separate grounds. First, the decisions of the Texas courts were apparently premised on the incorrect belief that peremptory challenges based in part, though not solely, on racial grounds are permissible under *Batson*. This Court has repeatedly held that where an individual's fourteenth amendment right to equal protection is threatened, conduct based on mixed racial and nonracial motives is not insulated from challenge. *See, e.g., Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265-66 (1977); *cf. Washington v. Davis*, 426 U.S. 229, 240-42 (1976). Mixed-motive explanations are especially dangerous where, as in the case of peremptory challenges, nonracial reasons may be easily generated. To allow anything but *totally* nonracial explanations would rapidly undermine *Batson*'s protections.

Second, the trial court made factual findings that were clearly insufficient as a matter of law. The *Tompkins* trial court abdicated its obligation to ascertain the legitimacy of the prosecutor's justifications in light of *Batson*'s requirement that such explanations be racially neutral, non-speculative and logically related to the particular case. *Batson*, 476 U.S. at 98. The lower court accepted the prosecutor's rebuttal at face value, thereby violating that court's duty to probe nonracial justifications for pretext in light of the evidence and circumstances of the case. *See, e.g., McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973); *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972); *Norris v. Alabama*, 294 U.S. 587, 593-96 (1935). Were trial courts not required to make an earnest attempt to judge the legal sufficiency and legitimacy of prosecutors' rebuttal the equal protection rights safeguarded by *Batson* would be meaningless.

Finally, the Texas Court of Criminal Appeals erred both by failing to review the legal sufficiency of the trial court's determination, and by failing to apply a "clearly erroneous" standard of review. In the first instance, the appellate court inappropriately deferred to the trial court's finding that the prosecutor lacked discriminatory intent, even though such finding was based on an obvious misapplication of federal law. Second, the reviewing court failed to employ the "clearly erroneous" standard of review contemplated by *Batson*. 476 U.S. 98 n.21. Contrary to its obligation, the appeals court deferred blindly to the court below, even though its independent examination of the record "cast considerable doubt upon the neutral explanations offered by counsel for the State." (J.A. 66 n.6A.) *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985); *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

ARGUMENT

I. *BATSON v. KENTUCKY* REAFFIRMS LONG-ESTABLISHED PRECEDENT THAT JURY SELECTION MUST BE TOTALLY RACE NEUTRAL

An unbroken line of cases, beginning over a century ago, has held that the Equal Protection Clause demands that a person's ability to serve on a jury be evaluated exclusively in terms of individual characteristics, rather than in terms of racial identity. *Strauder v. West Virginia*, 100 U.S. 303 (1880); *Ex parte Virginia*, 100 U.S. 339 (1880).[1] *Batson v. Kentucky*, 476 U.S. 76 (1986)

[1] *See, e.g., Alexander v. Louisiana*, 405 U.S. 625, 632 (1972) (holding that in order to constitutionally validate a *prima facie* case of discrimination in venire selection the state must show that "permissible racially neutral selection criteria and procedures have produced

reaffirmed this promise of equal protection, by requiring that where an inference of discrimination is raised by prosecutors' use of peremptory challenges, the State may validate the suspect challenge only by providing specific, logical and entirely nonracial reasons. Prosecutors are duty bound "to exercise their challenges only for legitimate purposes." 476 U.S. at 99 n.22. Thus, once a defendant has made a *prima facie* showing that the prosecutor exercised his peremptory challenges in a discriminatory manner, the prosecutor "must articulate a neutral explanation" for his strikes. *Id.* at 98.

Batson's requirement of racial neutrality must be construed to validate only those challenges that are motivated *entirely* by nonracial reasons. In *Tompkins*, the Texas Court of Criminal Appeals implies that even though challenges based on racial grounds *alone* are prohibited by *Batson*, challenges that are based on both racial *and* nonracial grounds may be permissible. The appellate court stated that if the prosecutor "admits a racially motivated reason for exclusion, *without more*, the trial judge should never find" that strike constitutional. (Emphasis added.) (J.A. 65 n.6.) The appellate court further stated that a defendant's *prima facie* showing of discrimination would stand unless the prosecutor "could come forward and demonstrate *some* 'neutral'—non-race related—explanation . . . ." (Emphasis added.) (J.A. 61.) That court concluded that no constitutional violation had occurred at trial, because the trial judge "found, implicitly, that the prosecuting attorneys did not exercise their peremptories against the five black venirepersons complained about *solely* on account of their race. . . ." (Emphasis added.) (J.A. 62.)

---

the monochromatic result"); *Whitus v. Georgia*, 385 U.S. 545, 552 (1967) (holding that in venire selection procedures, where "the opportunity for discrimination was present . . . it [must not be] resorted to"); *Cassell v. Texas*, 339 U.S. 282, 286 (1950) (holding that "[j]urymen should be selected as individuals on the basis of individual qualifications, and not as members of a race").

While the above opinion language may not conclusively demonstrate that the Texas courts have misread *Batson*,[2] the transcript of the *Batson* hearing in this case leaves little doubt on the point. Throughout the trial court's interrogation, the prosecutors freely and repeatedly conceded that even *after* this Court's decision in *Batson* it was the practice of the Harris County District Attorney's office to exercise their peremptory challenges based in part on considerations of race.[3]

The Texas courts' interpretation of *Batson* is manifestly incorrect. *Batson* cannot fairly be read to allow challenges which are based, *even in part*, on assumptions that rely on race to judge an individual's fitness as a juror. If race-based assumptions contribute in any way to the prosecutor's decision to use a peremptory challenge, the State's reasons are not neutral—as *Batson* expressly requires—and the strike violates the Equal Protection Clause. To allow anything but totally non-

---

[2] Indeed, although *Batson* is replete with references to the principle that the prosecutor's explanation of suspect challenges must be racially neutral, this Court's opinion does contain language practically identical to the last of the above quotations. 476 U.S. at 89.

[3] Testimony elicited from Harris County District Attorneys at the *Batson* hearing confirms that the race of veniremembers played a part in those prosecutors' decisions to retain or strike an individual, even though race may not have been the sole basis for exclusion. One prosecutor, when asked whether race would "enter into [his] decision . . . to use a peremptory challenge," answered that he "would not exclude that person solely because of his race." When reminded that he was asked whether "it would enter into [his] decision making process" he responded: "Oh, certainly. Certainly." Supp. R. vol. 1, 32-33. Indeed, Thomas Royce, the prosecutor who exercised two of the three disputed peremptory challenges, agreed that in selecting juries he presumed that blacks as a group were more inclined to be sympathetic and lenient towards black defendants. *Id.* at 156, 162. Other members of the District Attorneys' office noted that, in general, "there was a caution exercised when dealing with minorities," *id.* at 182, and that "many of those people have preconceived notions about law enforcement and government." *Id.* at 184.

racial explanations would quickly subvert *Batson*'s promise of discrimination-free peremptory challenges.[4]

This conclusion is inescapable in light of this Court's repeated rejection of mixed-motive explanations in other contexts. In *Arlington Heights v. Metropolitan Housing Dev. Corp.*, the Court noted that racial discrimination need not be the "sole," "primary," or "dominant" factor in an official decision for the Equal Protection Clause to be violated. It is enough that "a discriminatory purpose has been a motivating factor." 429 U.S. 252, 265-66 (1977).[5] *Cf. Washington v. Davis*, 426 U.S. 229, 240-42 (1976). Where the constitutional right to equal protection is threatened, therefore, mixed-motive explanations will simply not suffice.

The standard applied by the Texas courts to the sufficiency of the State's explanation of its peremptory challenges was thus fundamentally defective. Contrary to those courts' apparent understanding, a peremptory challenge need not be based "*solely*" on racial considerations to be constitutionally impermissible. Where assumptions based on race play even a minor part in the prosecutor's decision to strike a potential juror, that chal-

[4] As Justice Marshall observed in *Batson*: "Any prosecutor can easily assert facially neutral reasons for striking a juror . . . . If such easily generated explanations are sufficient to discharge the prosecutor's obligation to justify his strikes on nonracial grounds, then the protection erected today may be illusory." 476 U.S. at 106 (Marshall, J., concurring).

[5] The principle that mixed-motive explanations are not sufficient to rebut a *prima facie* case of discrimination is also found in Title VII case law. *See, e.g., McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 282 n.10 (1976)(noting that a Title VII plaintiff need not prove that he was "rejected or discharged solely on the basis of his race"); *Hopkins v. Price Waterhouse*, 825 F.2d 458 (D.C. Cir. 1987), *cert. granted*, 108 S. Ct. 1106 (1988) (holding that mixed-motive explanations are insufficient to rebut the inference of impermissible gender discrimination in employment decision).

lenge is tainted. To satisfy *Batson*, the state's explanation must convince the trial court that the race of the juror had no bearing whatsoever on the decision to strike.

II. THE TRIAL COURT ABDICATED ITS RESPONSIBILITY TO EVALUATE THE LEGITIMACY OF THE PROSECUTOR'S EXPLANATION OF PEREMPTORY CHALLENGES AGAINST WHICH A PRIMA FACIE CASE HAD BEEN MADE

A. The Trial Court Must Actively Scrutinize The Prosecutor's Explanation For Pretext And Mixed Motives

Batson charged trial courts with responsibility for ensuring that prosecutors exercise their peremptory challenges for only legitimate, race-neutral purposes. *Batson*, 476 U.S. at 98-99. Accordingly, trial courts are required "to be sensitive to the racially discriminatory use of peremptory challenges." *Id.* at 99. This obligation to scrutinize thoroughly the State's conduct for discriminatory purpose is not new to equal protection doctrine. As this Court stated in *Arlington Heights*, 429 U.S. at 266 "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Where discriminatory motives are alleged to underlie official decisions, the trial court has an active role in "examin[ing] the purpose underlying the decision." *Id.* at 268. *See also Alexander v. Louisiana*, 405 U.S. 625, 630 (1971) (trial courts may find it necessary to undertake a "factual inquiry" that "takes into account all possible explanatory factors").

Under *Batson*, a defendant alleging the impermissible exclusion of veniremembers "may make out a prima facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. . . . Once the defendant makes

the requisite showing, the burden shifts to the State to explain adequately the racial exclusion." 476 U.S. at 93-94. Accordingly, the adequacy of the prosecutor's rebuttal explanation must be tested by the trial court. To ensure that only legitimate explanations are accepted, the trial court's inquiry must be designed to distinguish sincere from contrived reasons, and wholly nonracial from mixed motives.[6]

To fulfill its *Batson* obligations the trial judge must take the initiative to evaluate each proffered explanation in light of the factual and legal issues in the case, his observation of the prosecutor's *voir dire* and his knowledge of trial techniques. This role is fully consistent with *Batson*'s requirement that trial courts be "alert" and "sensitive" to racially discriminatory challenges while supervising *voir dire*. 476 U.S. at 99, n.22.[7]

An active role for the trial court is also suggested by numerous prior holdings of this Court that once a *prima facie* inference of discrimination is raised, a probing

---

[6] *See, e.g., Garrett v. Morris*, 815 F.2d 509, 511 (8th Cir.), *cert. denied sub nom. Jones v. Garrett*, 108 S. Ct. 233 (1987) ("the court has a duty to satisfy itself that the prosecutor's challenges were based on constitutionally permissible trial-related considerations, and that the proffered reasons are genuine ones, and not merely a pretext for discrimination"); *People v. Hall*, 35 Cal. 3d 161, 167, 672 P.2d 854, 858 (1983) ("[I]t is imperative, if the constitutional guarantee is to have any real meaning, that . . . the allegedly offending party . . . come forward with explanation to the court that demonstrates other bases for the challenges *and* that the court satisfy itself that the explanation is genuine. This demands of the trial judge a sincere and reasoned attempt to evaluate the prosecutor's explanation.") (Emphasis in original.)

[7] *See Garrett v. Morris*, 815 F.2d at 511; *Ex parte Branch*, No. 86-500 slip op. at 21-22 (Ala. Dec. 4, 1988); *People v. Hall*, 35 Cal. 3d at 167, 672 P.2d at 858; *Gamble v. State*, 257 Ga. 325, 327, 357 S.E.2d 792, 794-95 (1987); *State v. Antwine*, 743 S.W.2d 51, 64-65 (Mo. 1987), *cert. denied*, 108 S. Ct. 1775 (1988); *State v. Gilmore*, 103 N.J. 508, 536-37, 511 A.2d 1150, 1164-65 (1986).

review of assertedly reasonable and neutral conduct is necessary. Such is the teaching of *Norris v. Alabama*, 294 U.S. 587, 593-96 (1935) which found the State's rebuttal of a *prima facie* inference of discrimination in the selection of jury venires inadequate when that explanation was considered in light of the evidence in the record. The sufficiency of the rebuttal must be assessed in view of the entire circumstances as they have been presented. *See Alexander v. Louisiana*, 405 U.S. at 632; *Whitus v. Georgia*, 385 U.S. 545, 550-51 (1967).

Likewise, in the employment discrimination context, this Court has consistently ruled that the inquiry into a complainant's *prima facie* case of discriminatory employment practices or treatment is not complete once an employer presents his explanation. The court's inquiry must also consider whether the "stated reason . . . was in fact pretext." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1972); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255-56 (1981).

In criminal prosecutions, earnest trial court scrutiny of the legitimacy of the prosecution's explanation of its peremptory challenges is especially crucial.[8] Exclusion of a cognizable class "may have unsuspected importance in any case that may be presented." *Peters v. Kiff*, 407 U.S. 493, 503-504 (1972). Certainly in petitioner's case, where he faces a sentence of death, the consequences of constitutionally impermissible discrimination in jury selection could not be greater. To require less than the closest scrutiny of a prosecutor's explanation would transform the *Batson* inquiry into a mere formality.

---

[8] The trial court's duty to probe the State's rationale is especially critical where, as here, defense counsel was not afforded a meaningful opportunity to rebut the prosecutor's explanation. Even though defense counsel had no way of anticipating the explanations the prosecutor would offer at the *Batson* hearing, the trial court required that defense comment on the prosecutor's explanations be made within a few days of the *Batson* hearing's close, but 2½ weeks before the record was transcribed. Supp. R. vol. 1 at 227-28.

The trial court must, first, elicit all of the prosecutor's reasons for a suspect strike, in order to ensure that mixed motives are not present. To require less than *all* of the prosecutor's actual reasons would enable the state to sustain impermissible mixed-motive strikes by identifying a single nonracial consideration. Once all of the prosecutor's reasons have been elicited and determined, at least facially, to arise from completely nonracial motives, the trial court must assure that each rationale is legitimate and not pretextual. *Batson* requires that each legitimate explanation be "neutral" and "related to the particular case to be tried." 476 U.S. at 98.[9] These criteria are most effectively tested by considering, generally (1) whether similarly situated white and minority veniremembers were treated differently, and (2) whether the justification for challenge was legally or factually relevant to the case at bar.

Analogous factors were credited by this Court in *McDonnell Douglas v. Green*, 411 U.S. at 804, and *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 282-83 (1976), where evidence that similarly situated white and black employees were treated differently was considered especially relevant to the showing of pretext in the Title VII context. Likewise, *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975) held that where employers are required to show that an employment practice bears a job-related reason, such reason must be judged to be "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job."

To satisfy their duties under *Batson*, therefore, trial courts must conduct an independent inquiry sufficient to ensure that the state's explanations are legitimate,

[9] *Batson* further noted that "the prosecutor must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges." 476 U.S. at 98 n.20 (quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. at 258).

racially neutral and logically related to the case. At a minimum, the trial court should undertake a detailed *sua sponte* examination of whether: (a) minority veniremembers were stricken, while similarly situated white venirepersons escaped challenge;[10] (b) the *voir dire* of minority venirepersons appeared designed to elicit a particular response, and similar examination was not undertaken of white venirepersons;[11] (c) the challenged venireperson was examined in a perfunctory manner, if at all;[12] and

[10] *Roman v. Abrams*, 822 F.2d 214, 228 (2d Cir. 1987) (dissimilar treatment raises suspicion that reason is pretextual); *Garrett v. Morris*, 815 F.2d at 514 (challenges based on "lack of education, background, and knowledge" were invalid where whites with similar backgrounds survived challenge); *People v. Trevino*, 39 Cal. 3d 667, 691-92, 704 P.2d 719, 733 (1985) (challenges of Hispanic surnamed venirepersons invalid where similarly situated whites expressed similar ambivalence towards the death penalty but went unchallenged); *State v. Slappy*, 522 So. 2d 18, 19-20 (Fla. 1988) (peremptory challenge invalid where prosecutor explained that a black elementary school teacher was struck as possibly being too liberal while a white elementary school teacher was not challenged); *Floyd v. State*, 511 So. 2d 762, 765 (Fla. 1987) (where prosecutor struck black veniremember because he was a student, failure to strike a white student was "strong evidence" that the reason was "a subterfuge to avoid admitting discriminatory use of the peremptory challenge").

[11] *People v. Turner*, 42 Cal. 3d 711, 726-27, 726 P.2d 102, 111 (1986) (minority venireperson struck because of single, ambiguous response to prosecutor's question); *People v. Hall*, 35 Cal. 3d at 165, 672 P.2d at 856 (only minority venirepersons were asked where they grew up which served as basis for exclusion).

[12] *Garrett v. Morris*, 815 F.2d at 514 (prosecutor's reasons pretextual when he had not explored in *voir dire* the purported basis for challenge); *People v. Turner*, 42 Cal. 3d at 714, 726 P.2d at 111 ("prosecutor's failure to engage . . . 'in more than desultory voir dire . . .' is one factor supporting an inference that the challenge is in fact based on group bias"); *People v. Wheeler*, 22 Cal. 3d 258, 281, 583 P.2d 748, 764 (1978) ("the failure of [the prosecutor] . . . to engage these jurors in more than desultory *voir dire*" may support the demonstration of discrimination); *State v. Slappy*, 522 So. 2d at 23 n.2 (where two black veniremembers excused without

(d) the explanation offered by the State was not logically related to the elements of the offense.[13]

In this last regard, it is essential that a logical correlation is established between the prosecutor's rationale and the legal issues and facts as they are known at the time of *voir dire*. This inquiry is not simply an evaluation

---

questioning, the safeguards would be "meaningless . . . if, by simply declining to ask any questions at all, the state could excuse all blacks from the venire"); *Gamble v. State*, 257 Ga. at 329-30, 357 S.E.2d at 795 (prosecutor's explanations invalid where no *voir dire* of challenged venireperson).

[13] *Roman v. Abrams*, 822 F.2d at 228 (prospective jurors' knowledge of computers, electronics, and bookkeeping not basis for exclusion on grounds that they may not be able to accept reasonable doubt standard of proof); *United States v. Chalan*, 812 F.2d 1302, 1314 (10th Cir. 1987) (unspecified dissatisfaction with venireperson's background and juror's questionnaire not acceptable grounds for exclusion); *People v. Trevino*, 39 Cal. 3d at 689, 704 P.2d at 731 (prosecutor must show venireperson's "specific bias," *i.e.*, "bias relating to the particular case on trial or the parties or witnesses thereto" (quoting *People v. Wheeler*, 22 Cal. 3d at 276, 583 P.2d at 761)); *People v. Wheeler*, 22 Cal. 3d at 282, 583 P.2d 748, 765 (1978) (burden of justification will be satisfied where prosecutor explains suspect challenges on grounds that are "reasonably relevant to the particular case on trial or its parties or witnesses—*i.e.*, for reasons of specific bias"); *State v. Slappy*, 522 So. 2d at 20, 23 (invalid strike where prosecutor stated that challenged veniremember was too liberal because she was a school teacher but failed to demonstrate that she shared that trait); *Gamble v. State*, 257 Ga. at 328, 357 S.E.2d at 795-96 (exclusion of potential juror because he is a Mason invalid where "it is not clear how Masonic membership is related to this case"); *Commonwealth v. Soares*, 377 Mass. 461, 485, 387 N.E.2d 499, 514 (1979) (peremptory challenges valid where a juror's "unique relationship to the particular case raises the spectre of individual bias"); *Commonwealth v. DiMatteo*, 12 Mass. App. Ct. 547, 552-53, 427 N.E.2d 754, 757 (1981) (widowhood an insufficient indicator of bias in a trial for armed robbery of a service station); *State v. Gilmore*, 103 N.J. at 542, 511 A.2d at 1168 (purported lack of intelligence not grounds for challenge where issues to be resolved by the jury do not demand "high intellectual achievement of the jurors" (quoting *State v. Gilmore*, 199 N.J. Super. 389, 411-12, 489 A.2d 1175, 1187 (1985))).

of the prosecutor's credibility as a witness during the *Batson* hearing. Nor is the judge merely "applying some kind of legal standard to what he sees and hears," as the judge does, for example, when he determines juror bias against the death penalty. *See Wainwright v. Witt*, 469 U.S. 412, 429 (1985). Rather, the prosecutor's explanation must be rationally and analytically related to the case being tried.

Finally, the trial court's formal findings must supply sufficient detail to assure that upon review the basis for each *Batson*-related conclusion is clear. Absent such explanation, a reviewing court will lack the necessary understanding to distinguish those findings entitled to great deference from those which are not.

B. The Trial Court Utterly Failed To Fulfill Its Duty To Determine The Legitimacy Of The Prosecutor's Explanations

In *Tompkins*, the trial court completely abdicated its *Batson* obligations. The repetitious and conclusory nature of the court's findings is itself a strong indication that the State's rebuttal explanations were accepted on their face. In each instance, the court recited as if by rote that "the State's excusal . . . was neutral, relative, clear and legitimate as required by *Batson* and was not racially motivated." (J.A. 47-49.) When the stated basis for those findings is examined, the court's failure to evaluate independently the State's explanations is obvious with respect to three of the five veniremembers challenged peremptorily. In each case, the record reflects that the prosecutor's explanations were neither neutral nor logically related to the matter at bar.[14]

---

[14] Although in this case three peremptory challenges are suspect, it should be noted that the improper exclusion of only one of the veniremembers would be constitutionally offensive. As *Batson* stated: " 'A single invidiously discriminatory governmental act' is not 'immunized by the absence of such discrimination in the making of other comparable decisions'." 476 U.S. at 95 (quoting *Arlington Heights*, 429 U.S. at 266, n.14).

(i) Isabella Thomas was purportedly challenged because she had "problems" following the law of circumstantial evidence. Supp. R. vol. 1, 109. The trial court accepted this rationale without the slightest attention to its adequacy. When tested, the proffered explanation is plainly insufficient to overcome the defendant's *prima facie* inference. First, at the time the strike was exercised the prosecutor's case was based on direct evidence. (J.A. 68.) Hence, the law of circumstantial evidence was not relevant or sufficiently correlated to the case to be a proper basis for challenge. Second, Ms. Thomas' problematic responses were elicited through the prosecutor's own confused hypothetical; when the questions were clarified, Thomas responded without problem.[15] Finally, similarly situated white veniremembers also responded with difficulty to questions pertaining to the laws of circumstantial evidence, intent and causation, but went unchallenged. R. vol. 11, 1550-53; R. vol. 6, 316-19; R. vol. 15, 2261-65.

(ii) Leroy Green was purportedly challenged because he was a postal employee, and because he responded nonverbally. Supp. R. vol. 1, 208-18. Again, this explanation does not even come close to meeting *Batson*'s requirements. The prosecutor never explained how postal employees as a group were biased, in what way Green shared that bias or how any such bias was related to the case. Indeed, no such explanation is logically possible.[16]

[15] The prosecutor asked Ms. Thomas whether she could find someone guilty of burglary if he was caught several days after the crime with the victim's property. Ms. Thomas responded negatively. After further explanation, she responded that she could if "shown all the possibilities beyond a reasonable doubt." R. vol. 9, 1006-11.

[16] Neither of the Texas courts who considered this rationale found it plausible. Although the appellate court found that Green "was . . . struck solely . . . because he had been an employee of the United States Postal Service for some thirteen years . . ." (J.A. 70-71), the trial judge omitted all reference to this part of the State's explanation from its "Findings of Fact and Conclusions of Law." (J.A. 49.)

The remainder of the State's explanation cannot be considered race-neutral, since similarly situated white venirepersons were not challenged even though they also responded to questions nonverbally.[17]

(iii) Frank Samuel was purportedly challenged because he appeared to be illiterate, a conclusion based on the prosecutor's suspicion that his data sheet might have been filled out by another person, and because he responded to three questions by nodding. Supp. R. vol. 1, 135-43. This explanation is plainly insufficient. First, nearly a dozen unchallenged white veniremembers also responded nonverbally to examination.[18] Second, Samuel was never questioned directly on the subject of his literacy or about the data sheet. Indeed, at the *Batson* hearing the prosecutor acknowledged that Mr. Samuel could read when asked to do so at *voir dire*. Supp. R. vol. 1, 138. Further, the prosecutor undermined the veracity of this rationale by disputing, in another context, the importance and verifiability of the same questionnaire. Supp. R. vol. 1, 71.

The trial court, when faced with explanations that were clearly implausible or suggestive of bias, inexplicably failed to recognize its obligation to assess the legitimacy of these justifications. Rather than pursue further inquiry, or engage in a serious evaluation of their sufficiency, the court blindly accepted the explanations at face value. In so doing, the court woefully failed to meet the legal standard set forth in *Batson*.

[17] Nonverbal responses from unchallenged venirepersons are scattered throughout the *voir dire* transcript. Charles Vana, R. vol. 11, 1469, 1472; Denise Hollingsworth, R. vol. 11, 1544-47, 1556, 1565, R. vol. 12, 1590; William Wright, R. vol. 12, 1761-62, 1773; Sharon Miller, R. vol. 16, 1827-28, 1832, 1834, 1838, 1842-43, 1846; Carol Moore, R. vol. 16, 1885-86, 1890-91, 1903, 1917; Peggy Whitley, R. vol. 5, 172, 179, 186, 189, 192-93; and Curtis Sumrall, R. vol. 7, 500, 571, 588, 664, 672, all responded nonverbally.

[18] *See supra* note 17.

C. The Trial Court May Consider Only The Prosecutor's Actual Reasons For Challenge

Implementation of *Batson* presents special problems where, as here, prosecutors are unable to recall the precise basis for a suspect challenge. In *Tompkins*, the *Batson* hearing was held six years after the original *voir dire*. Situations such as these are particularly ripe for speculative, equivocal, and possibly disingenuous explanations.

The only satisfactory rebuttal of a *prima facie* showing of discriminatory purpose is testimony by the prosecutor of his *actual*, nonracial reason or reasons for peremptorily challenging the venireperson. Under *Batson*, a prosecutor must offer an "explanation of his 'legitimate reasons' for exercising the challenge." 476 U.S. at 95 n.20 (quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. at 258). This standard is meaningless unless the prosecutor is obligated to present his actual reasons, and not simply his best guess. Explanations formulated in hindsight and composed largely of speculation or impressionistic reasoning cannot, as a general matter, fulfill the *Batson* obligations.

A trial court's invitation to speculate concerning facts of which the prosecutor has no honest recollection cannot fail to encourage calculated responses or selective recall that may consciously or unconsciously arise from prejudice. As Justice Marshall emphasized in *Batson*, such reasons may be easily generated, 476 U.S. at 106. Because *post hoc* reconstructions will, if accepted, inevitably erode the safeguards *Batson* was designed to erect, this Court should make explicit the logic of *Batson* that only by properly explaining its *actual* motivations may the State rebut a defendant's *prima facie* showing of discrimination.

The fact that the *Batson* hearing in the present case was fraught with examples of the prosecutor's specula-

tive reasoning[19] thus provides an independent ground for reversal.

III. THE APPELLATE COURT APPLIED INCORRECT STANDARDS OF REVIEW

Batson held that an appellate court should give "appropriate deference" to trial court findings of intentional discrimination. 476 U.S. at 98 n.21. The Texas Court of Criminal Appeals, however, was *blindly deferential* in this case to the trial court's finding that the State did not challenge any of five black venirepersons based on their race. Because the trial court's findings are determinative of petitioner's equal protection claim, this Court should declare erroneous the appellate court's lax review of those findings.[20]

---

[19] For instance, when the prosecutor was asked whether she could recall why she asked a particular question of a challenged venireperson, the prosecutor responded: "No, I can just go on what it indicates from the questions and what I asked and the answers I got and from what I asked him here, which was unusual for me to ask, I have to assume there was a reason I asked it and that is the type of thing I would have asked if I were getting nonverbal communications coming from the person in the witness box." Supp. R. vol. 1, 224. Later, when asked why nonverbal responses to *voir dire* made her inclined to strike a venireperson, the prosecutor could only respond generally, "[t]here are all sorts of reasons that are nonverbal that give you a feeling about whether a juror would make a good juror in your case or how they feel about you or how you feel about them." Counsel responded: "Okay, you just don't remember. Is that correct?"; to which the prosecutor answered "Right, and if we had done it at the time . . ." *Id.* at 225.

[20] This Court's examination of the standards of appellate review applied by the Texas Court of Criminal Appeals in this case would not "unduly interfere with the legitimate activities of the States." *Younger v. Harris*, 401 U.S. 37, 44 (1971). Generally, a state appellate court is free, as a matter of state law, to decide the level of deference to accord to a trial court's factual findings. *Texas v. Mead*, 465 U.S. 1041, 1044 n.2 (1983) (Rehnquist, J., dissenting from denial of certiorari). Notwithstanding this freedom, however, where federal constitutional rights are concerned, a state court is

The Court of Criminal Appeals was overly deferential to the trial court's findings in two respects. First, the appellate court failed to review the legal sufficiency of the trial court's process for evaluating the legitimacy of the prosecutor's explanations, as required by *Batson*. Second, the Court of Criminal Appeals improperly applied a "rational basis" standard in its review of the trial court's findings, rather than the more stringent "clearly erroneous" standard called for in *Batson*.

A. The Court Of Criminal Appeals Failed To Review The Legal Sufficiency Of The Trial Court's Findings

The court of appeals failed to assure that the trial court's ultimate findings of no discrimination reflected the *Batson* requirements that the prosecutor's explanations be "legitimate," "neutral" and "related to the particular case to be tried." 476 U.S. at 98. As explained

---

obligated to "consider federal claims in accord with federal law." *Schneckloth v. Bustamonte*, 412 U.S. 218, 259 (1973) (Powell, J., concurring).

Where, as in the context of *Batson* challenges, the factual findings of a state trial court control the outcome of a defendant's federal constitutional claims, this Court has insisted on examining the adequacy of state appellate review. For example, this Court has independently examined evidence in cases concerning the exclusion of blacks from juries. The state appellate court's review of the trial court's fact-finding was closely scrutinized because, as in this case, the "conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former." *Norris v. Alabama*, 294 U.S. at 590; *see also Whitus v. Georgia*, 385 U.S. at 550. In federal habeas corpus proceedings, 28 U.S.C. §§ 2254(b), (d), federal courts are permitted to review state appellate court findings of evidentiary sufficiency to assure that state convictions have been secured in accord with the federal constitution. *Jackson v. Virginia*, 443 U.S. 307, 323 (1979). Otherwise, states might attempt to satisfy the "beyond a reasonable doubt" standard with nothing more than "a trial ritual." *Id.* at 316-17. Thus, where important constitutional rights are at stake, this Court may review both the facts found by state courts and the standards of state appellate review applied to such facts without offending principles of federalism.

above, the trial court must elicit and evaluate, as a predicate to its ultimate finding on intent, the prosecutor's explanation for each suspect challenge. The trial court's failure to conduct this evaluation in terms of the legal standards established by *Batson* necessarily invalidated the ultimate finding, and required the appellate court to set aside the trial court's finding that the prosecutor lacked discriminatory intent.

Deference to a finding of fact is not due where there has been no "conscious determination" by the trial court of the existence or nonexistence of critical subsidiary facts or legal conclusions. *Cf. Time, Inc. v. Firestone*, 424 U.S. 448, 463 (1976). Moreover, deference to a state trial court's factual finding is "inappropriate where . . . the trial court's findings are dependent on an apparent misapplication of federal law." *Gray v. Mississippi*, 107 S. Ct. 2045, 2053 n.10 (1987) (citing *Rogers v. Richmond*, 365 U.S. 534, 547 (1961)). The trial court's findings in this case clearly reflect an erroneous view of the requirements of *Batson*, and should have been set aside on that ground. *See Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982).

A trial court's obligation under *Batson* to find legally sufficient facts attenuates the degree of deference that a reviewing court should give to the ultimate finding. *Cf. Bose Corp., Inc. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 500 n.16 (1984) ("The conclusiveness of a 'finding of fact' depends on the nature of the materials on which the finding is based."). Less deference is due when the sufficiency of the trial court's ultimate factual finding is based, in part, on legal conclusions.[21] In the *Batson* context, the trial court's ultimate intent finding "is inseparable from the principles through

---

[21] "[W]hile 'what happened' may be viewed as a question of fact, the legal *sufficiency* of the evidence may be viewed as the equivalent of a question of law." Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229, 236 (emphasis in original).

which it is deduced," *id.* at 501 n.17, and should therefore be independently reviewed on appeal. *Id.*

In the present case, the Court of Criminal Appeals did not properly evaluate whether the trial court's findings were legally sufficient.[22] In fact, they were not. *See* discussion, *supra*, 15-17. Even the Court of Criminal Appeals recognized that at least one of the prosecutor's explanations, while nonracial, was so patently unrelated to the case as to be "shocking and totally not understandable" based on the record. (J.A. 68.) Nevertheless, apparently believing that it was bound to review only the trial court's ultimate factual findings—not the legal sufficiency of the court's underlying compliance with the *Batson* standards—the appellate court declined to overrule the court below.

The petitioner's conviction thus suffers from a wholesale abdication by the Texas courts of their judicial obligation to test the legal sufficiency of a proffered conclusion. Just as the trial court blindly accepted the prosecutor's explanation, so the court of appeals closed its eyes in undiscerning deference to the trier of fact's ultimate findings. Carried to its logical conclusion, the judicial philosophy of the courts below would allow a prosecutor to rebut a *prima facie* case through mere denial of discriminatory intent or affirmation of personal good faith; precisely the result that *Batson* expressly prohibits. 476 U.S. at 97-98.

B. The Court Of Criminal Appeals Erred By Reviewing The Trial Court's Findings According To A "Rational Basis" Standard, Instead Of The "Clearly Erroneous" Standard Required By *Batson*

Even assuming that the ultimate findings of the trial court were not legally deficient, the appellate court in-

[22] The error is made all the more obvious by the fact that the trial court, apparently recognizing the hybrid nature of its *Batson* hearing findings, styled them "Findings of Fact and Conclusions of Law." (J.A. 47.)

correctly applied a "rational basis" standard in reviewing the finding that the State's exercise of its peremptory challenges was not racially discriminatory. (J.A. 66 n.6A.) That standard would require reversal of the trial judge's findings of fact "only if no rational trier of fact could have failed to find his factual allegation true by a preponderance of the evidence." *Id.* at 8, citing *Van Guilder v. State*, 709 S.W.2d 178 (Tex. Crim. App. 1985), *cert. denied*, 106 S. Ct. 2891 (1986); *Schuessler v. State*, 719 S.W.2d 320 (Tex. Crim. App. 1986). Because such a standard of review does not insure proper scrutiny of the basis for trial court findings regarding discrimination, it is inadequate to protect the fundamental rights guaranteed under *Batson*.

Indeed, this Court suggested in *Batson*, by referring to its opinion in *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985), that the appropriate level of appellate review for *Batson* findings of purposeful discrimination was the "clearly erroneous" standard. *Batson*, 476 U.S. at 98 n.21. The clearly erroneous standard requires, at a minimum, that an appellate court (1) review the *entire* record before assessing the validity of a trial court's factual findings and (2) hold the findings clearly erroneous when, based on the entire record the reviewing court "is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948); *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 855 (1982). The Court of Criminal Appeals failed to satisfy either of these requirements.[23]

[23] Numerous state supreme courts have adopted the clearly erroneous standard in reviewing the *Batson* hearing findings of trial courts. *See, e.g., Ex parte Branch*, No. 86-500 slip op. (Ala. May 13, 1988); *State v. Alvarado*, 410 N.W.2d 118 (Neb. 1987); *Johnson v. State*, No. 57,526 slip op. (Miss. May 18, 1988) (en banc). Other state supreme courts have applied ambiguous standards of review by referring to the high level of deference owed to trial court findings. *See, e.g., State v. Jackson*, No. 477A87 slip op. (N.C. May 5,

1. *The Court Of Criminal Appeals Failed To Review The Entire Record Before Upholding The Trial Court's Findings Regarding The Prosecutor's Intent*

The appellate court reviewed the record of this case selectively, to the detriment of petitioner's fourteenth amendment rights. The Court refused to consider the prosecutor's disparate treatment of similarly situated white and black venirepersons during *voir dire*, despite defense counsel's offer of such a comparison. (J.A. 66 n.6A.) The appellate court's failure to consider such evidence in the record is plainly contrary to the independent examination of the entire record contemplated by the clearly erroneous standard of appellate review. *Bose*, 466 U.S. at 499 (1984). The Court of Criminal Appeals mistakenly treated defense counsel's proposed comparison of evidence *already in the record* as new evidence. It thus failed to recognize that analysis of evidence in the record is well within the obligation of a reviewing court. *See, e.g., Amadeo v. Zant*, 108 S. Ct. 1771, 1777 (1988).

The Court of Criminal Appeals' failure to review the entire record in this regard was not a harmless procedural default: it was an egregious abdication of its responsibility to safeguard petitioner's constitutional rights. *Stone v. Powell*, 428 U.S. 465, 493-94 n.35 (1976). The appellate court recognized that defense counsel's comparison of similarly situated white and black venirepersons "cast considerable doubt upon the neutral explanations offered by counsel for the State," (J.A. 66 n.6A), and might have "materially affected the trial judge's ultimate findings of fact" had it been presented at the *Batson* hearing. *Id.* With its head firmly planted in the

---

1988) (special deference); *State v. Gonzalez*, 206 Conn. 391 (1988) (great deference). This growing plethora of state standards can only be rationalized through the confirmation by this Court that the clearly erroneous standard is constitutionally required.

Texas sand, however, the court observed that "we do not consider this circumstance in reviewing the trial judge's findings in this cause." *Id.*

The appellate court's refusal to consider defense counsel's supplemental brief was not only perversely unjust; it was also patently illogical in light of the mechanics of the *Batson* hearing. The trial judge and defense counsel did not hear the prosecutor's race-neutral explanations for having struck certain venirepersons until the *Batson* hearing was held. By effectively requiring the defense counsel at the *Batson* hearing spontaneously to analyze multi-volume *voir dire* transcripts and to compare similarly situated white and black venirepersons vis-a-vis the prosecutor's explanation in order to preserve the evidentiary question on appeal, the appellate court placed an impossible burden on defense counsel. To disregard a compelling presentation of evidence on this basis, absent some legitimate procedural justification, is both unfair and impermissible under *Batson*. 476 U.S. at 96-98.

2. *The Court Of Criminal Appeals Failed To Hold The Trial Court's Findings Clearly Erroneous, Despite Its Conviction That Those Findings Were Not Credible*

The Court of Criminal Appeals accepted the trial court's intent findings even though the court felt, based on its own review of the record, that certain of the prosecutor's race-neutral explanations were not credible. This unwarranted degree of deference violates the clearly erroneous standard of review and undermines the degree of judicial inquiry contemplated by *Batson*.

As noted above, the record raises serious questions about the veracity and sufficiency of the prosecutor's explanations. The appeals court recognized the apparent inconsistencies in the trial court's findings. In the case of the prosecutor's strike on grounds that the venireperson had problems with the law of circumstantial evi-

dence, the appeals court described this explanation as "shocking and totally not understandable." (J.A. 68.) "Without more," the court continued, "we would have to hold that only an irrational trier of fact could have accepted this reason as a 'neutral explanation'." *Id.* Nonetheless, the court, on its own initiative, supplied further justification for the strike—that a jury instruction on circumstantial evidence would still have been a theoretical possibility.[24] In the case of the prosecutor's strike on grounds that the venireperson was a postal employee, the appeals court was given "great concern" (J.A. 70), because of the "difficulty in understanding the relevancy of a venireperson's employment as a postman . . . as far as

---

[24] In the face of implausible and ambiguous facts in the record, the appellate court impermissibly supplemented the trial court's findings by engaging in its own speculation concerning the prosecutor's reasons for two of the suspect peremptories. First, with regard to the venireperson struck because of her reservations about circumstantial evidence, the appeals court substituted an imputed motive for the prosecutor's stated motive for exercising the peremptory challenge: "[W]e hold that the prosecuting attorney exercised a peremptory on the venireperson rather than risk a hung jury." (J.A. 70.) Second, the prosecutor struck a venireperson alleged to be illiterate. Yet it was the Court of Criminal Appeals, and not the prosecutor, that attempted to correlate this explanation to the case by concluding that the case was going to include "detailed written jury instructions" (J.A. 70), thus making the alleged illiteracy a legitimate basis for challenge. In fact, at the *Batson* hearing, the prosecutor admitted that the foreman jury charge was usually read to the jury. Supp. R. vol. 1, 144.

Faced with this clear failure by the State to meet its burden under *Batson*, the Court of Criminal Appeals should have moved without hesitation to set aside the conviction. If it is inconsistent with the values protected by *Batson* to allow the prosecution to speculate concerning his reasons for exercising a suspect peremptory challenge (*see* discussion, *supra*, at 18-19), it is all the more impermissible for a court of appeals far removed in time, space and orientation from the event at issue, to substitute its own "best guess" as to the State's motive. This error, also, constitutes an independent cause for reversal.

his qualifications for jury service." (J.A. 71.) However, the court overlooked not only this grave insufficiency, but also the fact that the trial court had not even mentioned the employment issue in its findings (J.A. 49), and affirmed the legitimacy of the State's explanation for the sole reason that it was not race-related. (J.A. 71-72.)

In light of its stated reservations, the appeals court's uncritical deference to the trial court finding on these venirepersons was wholly unjustified. A reviewing court must set aside a finding, even if there is some evidence in the record to support it, when the court feels based on the entire evidence that a mistake has been made. *Anderson*, 470 U.S. at 573; *Gypsum Co.*, 333 U.S. at 395. The Court of Criminal Appeals should have clearly rejected findings which it found "shocking and totally not understandable" and the cause for "great concern," rather than sustain them on the basis of its own speculation or artificially narrow view of the record.

This is no less true where the trial court's findings is in part based on a "credibility" determination. *See* J.A. 65. A witness' facially credible testimony may be contradicted or rendered inconsistent by other evidence. *Anderson*, 470 U.S. at 575. Here, the prosecutor's race-neutral explanation concerning the venireperson's hesitancy about circumstantial evidence was squarely contradicted by the prior admission into evidence of defendant's confession. In such a case, a reviewing court should find clear error, even though the finding is purportedly based on a credibility determination. *Id.* The Court of Criminal Appeals committed reversible error when it declined to act on the glaring contradictions in the record before it.

CONCLUSION

The judgment of the Court of Criminal Appeals of Texas should be reversed and the cause remanded.

Respectfully submitted,

CONRAD K. HARPER
STUART J. LAND
Co-Chairmen

NORMAN REDLICH
Trustee

WILLIAM L. ROBINSON
JUDITH A. WINSTON

LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
1400 Eye Street, N.W.
Suite 400
Washington, D.C. 20005
(202) 371-1212

ROBERT E. MONTGOMERY, JR.
Counsel of Record

ERIKA A. KELTON

PAUL, WEISS, RIFKIND
WHARTON & GARRISON
1615 L Street, N.W.
Suite 1300
Washington, D.C. 20036
(202) 223-7300

Attorneys for Amicus Curiae